Appendix A

United States Court of Appeals
For the Third Circuit

No. 15250

Harvey B. Collins

vs.

Government of the Virgin Islands of the United States, George Wade, Sr., Aubrey Todman, Luther Benjamin, Clifford Benjamin and "John Doe", a Person, Firm, Association or Incorporation, and Being a Fictitious Name, Jointly, Severally and in the Alternative

Government of the Virgin Islands,
Appellant

No. 15290

Harvey B. Collins,
Appellant

vs.

Government of the Virgin Islands of the United States, George Wade, Sr., Aubrey Todman, Luther Benjamin, Clifford Benjamin and "John Doe", a Person, Firm, Association or Incorporation, and Being a Fictitious Name, Jointly, Severally and in the Alternative

Appeals From the District Court of the Virgin Islands,
Division of St. Thomas and St. John

Argued May 23, 1966

Before Kalodner, Hastie, Circuit Judges and Wright,
District Judge

OPINION OF THE COURT

(Filed September 14, 1966)

By Kalodner, Circuit Judge

Since they are interrelated, these two appeals at Nos. 15250 and 15290, will be separately considered and disposed of in this opinion.

The issue presented, at No. 15250, is whether the defendant-appellant, the Government of the Virgin Islands ("Government"), should have been afforded a jury trial in this personal injury action, tried to the District Court of the Virgin Islands without a jury, which resulted in a judgment for plaintiff-appellee, Harvey B. Collins, in the amount of $550,000.

Collins was seriously injured when the car which he was driving collided with a disabled truck on Harwood Highway, St. Thomas, in the early morning hours of February 4, 1961. The truck, owned by one Luther Benjamin, had been left astride part of the traveled portion of the highway after it blew two rear tires during the afternoon of February 3, 1961. The driver, William Samuel Wade, did not report the breakdown to the authorities. Despite the fact that the authorities subsequently became aware of the presence of the truck, it remained on the highway throughout the afternoon and evening. Collins' car collided with the right rear of the truck while he was returning from town to the submarine base where he was stationed.

On February 1, 1963 Collins filed suit in the District Court of the Virgin Islands to recover for the injuries he received in the accident against Government,

Luther Benjamin, and William Samuel Wade.[1] The complaint charged (Paragraph XVI) that the "accident and collision was caused by, precipitated through and was the proximate result of the carelessness, negligence, omissions and breach of duty of defendants" and prayed for judgment in the sum of $500,000.

Government was named as a defendant pursuant to special legislation, Act No. 921, January 25, 1963, which authorized Collins to file suit against Government and provided that he "may proceed against the Government as in the case of any other defendant".

On March 7, 1963, the defendant, Luther Benjamin, filed an answer to the complaint and on the same day served a copy on attorneys for Collins. The answer denied ¶ XVI of the complaint to the effect that defendants caused the accident by their "carelessness, negligence, omissions and breach of duty" and set up as a "special" defense "the contributory negligence of the plaintiff". Included in the answer was the statement "Defendant requests a Jury Trial".

Government filed its answer on March 27, 1963 and served a copy on the attorneys for Collins on the same day. The answer denied the allegations in ¶ XVI and set up as an affirmative defense that "the plaintiff was guilty of negligence" which "negligence proximately

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[1]Because of some doubt as to the identity of the owner of the truck and the driver, the complaint named as defendants "John Doe", "George Wade, Sr.", "Aubrey Todman", "Luther Benjamin", "Clifford Benjamin" and "the Virgin Islands of the United States". Subsequently it was determined that Luther Benjamin was the owner of the truck and William Samuel Wade the driver.

caused and contributed to cause the matters complained of in plaintiff's complaint". The answer contained no request for trial by jury nor was one filed up to the date of trial by Government.

Following extensive pre-trial discovery, a pre-trial conference was held on October 23, 1964. At that time, the defendant Benjamin was very much involved in the litigation, vigorously opposing a motion by Collins to strike his defense of contributory negligence. On October 24, 1964 Benjamin filed a motion for summary judgment. Trial was to commence on the morning of October 27, 1964; that morning in chambers while the jury waited in the courtroom, Collins moved to dismiss with prejudice the action against all defendants except Government. All parties agreed to this dismissal, and the District Court entered an Order accordingly. The Court then advised Government for the first time that the case would be tried without a jury despite Government's protest that it was entitled to a jury by reason of its reliance upon defendant Benjamin's demand for a jury trial. That afternoon, prior to the commencement of the trial, Government filed with the Court a written "Motion for Trial by Jury". The motion was directed to the discretion of the Court pursuant to Rule 39(b) of the Federal Rules of Civil Procedure. It stressed the fact again that Government had relied on the timely demand for trial by jury made by the defendant Benjamin "whose defense was based on questions of law and fact substantially similar to those relied on by the [Government]". The Court denied Government's motion.

The trial lasted for four days. On December 21, 1964 the Court entered its Findings of Fact and Conclusions of Law. The Court found that "the defendant Government of the Virgin Islands was negligent"; that "defendant's acts and omissions were the proximate cause of plaintiff's injuries"; that "the plaintiff was not guilty of contributory negligence". On December 22, 1964 judgment was entered against Government in the sum of $550,000. This appeal followed.

Government on this appeal contends that it was entitled to a trial by jury in this action because (1) a timely demand for a jury had been made by a co-defendant on which it was entitled to rely, and (2) the Court in the proper exercise of its discretion should have granted its Rule 39(b) motion.[2]

In reply, Collins urges that (1) Government had no right to a trial by jury; (2) if it had such a right, it was waived by failure to make a timely demand for a jury; and (3) the District Court did not abuse its discretion in denying Government's motion pursuant to Rule 39(b) for a jury trial.[3]

We are of the opinion that Government is correct in its contention that it was entitled to a jury trial by virtue of the timely demand for such trial by its co-defendant Benjamin, and that the District Court erred in holding to the contrary. That being so, we do not

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[2]Government also raised other issues on this appeal: the Court's findings did not reflect its own work product; the judgment was contrary to fact and law; the damages awarded were excessive. In view of our disposition we need not consider these points.

[3]Collins also contested Government's claims as to the merits, arguing that the judgment was consistent with fact and law.

reach Government's second contention that the District Court improperly exercised its discretion in denying Government's Rule 39(b) motion.

This must be said preliminarily with respect to Collins' threshold contention that Government, irrespective of all other considerations, had no right to a jury trial:

Government, like the states of the Union and the United States, is immune from suits in actions sounding in tort. This immunity is specifically provided by Act of Congress, 48 U.S.C.A. § 1541(b), which as here relevant, reads:

> "... no tort action shall be brought against the government of the Virgin Islands or against any officer or employee thereof in his official capacity without the consent of the legislature constituted by this chapter and said section."

Government waived this immunity when it enacted Act No. 921. The question as to whether Government having waived this immunity is entitled to a jury trial is free of the impact of the Seventh Amendment to the Constitution[4] since it is clear that a suit against the sovereign was not a suit at common law within the meaning of the Seventh Amendment. Rather the answer must be sought in well-established principles

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[4]Since the Virgin Islands is an unincorporated territory of the United States, c. 558, § 2, 68 Stat. 497, July 22, 1954, the Seventh Amendment to the Constitution would not normally be applicable to suits brought in the territory. Balzac v. People of Porto Rico, 258 U.S. 298, 304-05 (1922). However, the Virgin Islands by statute specifically provides for its application in appropriate situations. 5 V.I.C. § 321.

relating to the waiver of immunity by the sovereign. These may be stated as follows:

(1) "The Government cannot be sued, except with its own consent. *It can declare in what court it may be sued, and prescribe the forms of pleading and the rules of practice to be observed in such suits.* It may restrict the jurisdiction of the court to a consideration of only certain classes of claims against the United States. . . . If the claimant avails himself of the privilege thus granted, he must do so subject to the conditions annexed by the Government to the exercise of the privilege. Nothing more need be said on this subject." McElrath v. United States, 102 U.S. 426, 440 (1880). (emphasis supplied)

(2) The grant of jurisdiction by the sovereign is an aid in determining the method of trial in the absence of an express provision. United States v. Pfitsch, 256 U.S. 547 (1921); 5 Moore, Federal Practice ¶ 38.31(2), at 234 (2d ed. 1964).

Applying these principles to the instant case, we are of the opinion that the Government of the Virgin Islands intended to allow trial by jury in an action such as here brought by Collins. This is plainly indicated by the language of Act No. 921 which declared the terms of the waiver of immunity:

"Section 2. For the purpose of this Act and the adjudication of any such claim, the immunity of the Government to suit is hereby waived and *Harvey B. Collins may proceed against the Government as in the case of any other defendant, sub-*

> *ject to the same procedures and defenses* except for the defense of immunity from suit or of the statute of limitations, the provisions of which are hereby expressly waived; . . ." (emphasis supplied)

Thus, "the forms of pleading and the rules of practice to be observed" in this suit are expressly stated to be the same as in the ordinary tort action between private litigants. In such an action it is hornbook law that the parties are entitled to a trial by jury. This is the clear meaning of Government's emphasis on the fact that it be treated as "any other defendant".

Our conclusion is further supported by the fact that this was an action at law. Consistent with the principle enunciated in United States v. Pfitsch, *supra*, a grant of jurisdiction to the District Court recognizable at law carries with it a right to jury trial.

Collins seeks to avoid this result by relying on a line of cases which hold that there is no right to a jury trial in a "suit authorized by Territorial law against a municipality, based upon a moral obligation only", citing Guthrie National Bank v. Guthrie, 173 U.S. 528, 534 (1899). *Guthrie* is inapposite to our situation. *Guthrie* involved suits to recover debts owed by provisional governments of four villages established within the Territory of Oklahoma. Rules applicable to suits against municipalities which are subdivisions of the Government do not control suits against the Government itself. Collins has been misled by the term "Municipality of St. Thomas" which enjoys a special meaning in Virgin Islands' history. See Harris v.

Municipality of St. Thomas & St. John, 212 F.2d 323, 326 (3 Cir. 1954).

Although Government had the right to ask for trial by jury, this right could be waived if it failed to comply with Rule 38 of the Federal Rules of Civil Procedure.[5] Rule 38, provides in relevant part:

> Jury Trial of Right
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> "(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.
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> "(c) Same: Specification of Issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. . . .
>
> "(d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties."

The only timely demand for jury trial in this action was the general demand of defendant Benjamin

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[5]The same reasoning which leads us to hold that Government was entitled to jury trial, requires us to conclude that the "procedure" of this suit is controlled by the Federal Rules of Civil Procedure.

indorsed on his answer. Government made no demand, and thus, under Rule 38(d) waived its right to jury trial unless it was entitled to rely on the demand of its co-defendant. We are of the opinion that Government was so entitled.

In considering questions involving the right to jury trial, we must keep in mind certain well-settled principles:

Since "the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver" Aetna Insurance Co. v. Kennedy, 301 U.S. 389, 393 (1937).

" 'Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.' *Dimick v. Schiedt,* 293 U.S. 474, 486." Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 501 (1959).

These principles lead us to conclude that the better rule is that a defendant can rely on the jury demand of a co-defendant to the extent of the issues embraced by that demand. This is the result suggested by the leading commentators on the Federal Rules of Civil Procedure. Thus 5 Moore, Federal Practice ¶ 38.45, at 343-44 (2d ed. 1964) states:

> "In other words if a timely and proper demand for jury is made all other parties in the action who are affected by the demand may rely thereon and need not make a jury demand for issues embraced therein."

Similarly, 2B Barron & Holtzoff, Federal Practice and Procedure, § 877, at 49 (Wright ed. 1961) concludes:

> "Where a timely and proper demand for a jury is made by one party, all of the parties to the action who are interested in the issues as to which jury trial has been demanded may rely thereon and need not make an additional demand of their own."

DePinto v. Provident Security Life Insurance Company, 323 F.2d 826 (9 Cir. 1963), cert. den. 376 U.S. 950 (1964), is in accord.

There, one of the plaintiffs in a derivative stockholders' action against officers and directors of a corporation, filed a timely demand for a jury trial which he sought to withdraw prior to the trial. One of the defendants consented to the withdrawal; the others did not. None of the defendants moved for a jury trial. The case was then tried to the District Court with an "advisory jury". The District Court, thereafter, disregarded some of the advisory jury's findings and made its own findings of fact on its holding that defendants in a derivative stockholders' action are not entitled to a jury trial. On appeal, it was held that since one of the grounds asserted in the suit was negligence on the part of the defendants in the performance of their fiduciary duties, an issue was presented recognizable at common law, entitling the defendants to a jury trial. It was further held that since the defendants-appellants had not consented to the withdrawal of the jury trial demand of one of the plain-

tiffs, that they had not waived trial by jury. In so holding, the Court said at page 832:

> "Appellees point out that none of the appellants filed a demand for a jury trial prior to the original trial, and argue from this that they waived trial by jury.
>
> "It is provided in Rule 38(d), Federal Rules of Civil Procedure, that the failure of a party to serve such a demand constitutes a waiver of trial by jury. *But Rule 38(d) further provides that a demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties. It follows that failure to demand a trial by jury does not constitute a waiver if such demand is withheld in reliance upon a demand filed by another party, and if withdrawal of the latter demand is not consented to.*" (emphasis supplied)

Cf. DeGioia v. United States Lines Company, 304 F.2d 421, 425 (2 Cir. 1962). Compare Arrington v. McCarty, 136 So. 2d 119 (La. Ct. of App. 1961). In this connection, Collins' contention that any reliance should be strictly limited to adverse parties is without merit. The language of Rule 38 refers to "party" generally and cannot be read in the manner suggested by Collins.

Additional support for the proposition that Government is entitled to rely on the demand by its co-defendant for a jury is found in Rule 39(a), Federal Rules of Civil Procedure, which provides in part that "when trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action." Since an initial demand for a jury

will cause the designated issues to be docketed for jury action, it becomes superfluous for another party to make a similar demand, and hence such a party should be allowed to rely on the initial demand.

The defendant Benjamin's demand for a jury trial was a general one, indorsed on his pleading and not directed to specific issues. As such, it was deemed to cover all issues triable by a jury. Rule 38(c), Federal Rules of Civil Procedure. Collins argues that the demand made by Benjamin cannot aid Government because the "issues" embraced within that demand are not the same as those between Collins and Government. He also urges that the theories of negligence are different as between Benjamin and Government and that the standard of care owed by Government is different as between the two. We do not find the differences asserted by Collins dispositive in the present situation. This was an action instituted by a single complaint against Government and other defendants seeking to hold them jointly and severally liable for the same injury to Collins. As previously noted, ¶ XVI of the complaint charged the defendants jointly with "carelessness, negligence, omissions and breach of duty" and prayed for judgment against all defendants in the sum of $500,000. The answer of Benjamin controverted the allegations in ¶ XVI and raised the issue of contributory negligence. Government's answer denied ¶ XVI and claimed the injury was due to the negligence of Collins. Under these circumstances, and keeping in mind the well-settled principles in regard to jury trial, earlier referred to,

we hold that where co-defendants are sued on the theory that they are jointly and severally liable for the same injury arising out of a single occurrence, a request by one for a jury trial on the issues of negligence and contributory negligence enures to the benefit of the other as well.[6]

We reach this decision mindful of the fact that reliance by one party on the jury demand of another must be kept within proper limits if it is not to interfere with the orderly administration of justice. Thus resort to the theory of reliance will not aid a defendant whose demand for a jury trial was timely as to one party, but not as to another because the parties had filed their last pleadings on different dates, Christenson v. Diversified Builders Incorporated, 331

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[6]The same result has been reached by other courts through an application of Rule 39(b), Federal Rules of Civil Procedure. The leading case is Spiro v. Pennsylvania R. Co., 3 F.R.D. 351 (S.D.N.Y. 1942), almost identical on its facts with the present case. Plaintiff brought a personal injury action against the Pullman Company and the Pennsylvania Railroad. His demand for jury trial was made within ten days of the answer of the Pennsylvania Railroad but was not timely as to the Pullman Company's answer. The Court held that plaintiff had preserved his right to jury trial as to the "separate liability" of the railroad and the "joint negligence" of the defendants, but had waived it as to the "separate liability" of Pullman. However, since all issues but the "separate liability" of Pullman were to be tried to a jury, the Court in its discretion under Rule 39(b) ordered that all issues as to both defendants be tried to a jury. "Any other course would either deprive plaintiff of his constitutional right to a jury trial or would lead to duplication and confusion." (3 F.R.D. at 352) For more recent authority see Cataldo v. E. I. DuPont DeNemours & Co., 39 F.R.D. 305, 308 (S.D.N.Y. 1966). While recognizing that the interests of justice are served by either approach to the problem, we prefer to treat the question as coming within the language of Rule 38.

F.2d 992 (10 Cir. 1964), cert. den. 379 U.S. 843; nor where jury trial is sought as to third party issues and the only demand for jury trial was that indorsed upon the original complaint, McAndrews v. United States Lines Company, 167 F.Supp. 41 (S.D.N.Y. 1958), citing 5 Moore, Federal Practice ¶ 38.45, at 344, note 2 (2d ed. 1964). In the instant case, however, there was a single complaint arising from one occurrence charging joint liability for the same injury. Under these circumstances, justice is best served by permitting Government to rely on the jury demand of its co-defendant.

Finally, the fact that Collins was allowed to drop his action against Benjamin with Government's consent has no effect on Government's right to a jury trial. Once a jury trial has been demanded, trial must be had by jury unless there is a "written stipulation" or "oral stipulation made in open court" consenting "to trial by the court sitting without a jury". Rule 39(a), Federal Rules of Civil Procedure. See also, Rule 38(d), Federal Rules of Civil Procedure. Here there was no such stipulation by Government.

There remains for disposition the appeal at No. 15,290.

Following Judgment in his favor, Collins moved for an award of attorneys' fees pursuant to 5 V.I.C. § 541(b). This motion was denied by the District Court on the ground that "attorneys' fees cannot be awarded to a party against the Government". Collins then appealed, urging that attorneys' fees can be awarded against the Government of the Virgin

Islands and that under the terms of the statute such an award is mandatory.

Since we hold that the District Court erred in denying Government a jury trial, and that a new trial must be granted, Collins is no longer a "prevailing party" within the meaning of 5 V.I.C. § 541(b). Accordingly, his appeal at No. 15290 becomes moot. However, as the question may arise again following retrial, we call attention to our recent decision in Smith v. Government of the Virgin Islands, 361 F.2d 469, 471 (1966), to the effect that an award of attorneys' fees under 5 V.I.C. § 541(b) is a matter of judicial discretion.

For the reasons stated, the Judgment of the District Court will be reversed, and the cause remanded for a new trial with directions to proceed in accordance with this Opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Appendix B

In the District Court of the Virgin Islands
Division of St. Thomas and St. John

Civil No. 27-1963

Harvey B. Collins,
Appellee,

vs.

Government of the Virgin Islands of the United States, George Wade, Sr., Aubrey Todman, Luther Benjamin, Clifford Benjamin and "John Doe", a person, firm, association or incorporation, and being a fictitious name, jointly, severally and in the alternative

Government of the Virgin Islands,
Appellant.

Background Statement

This is an action for damages by Harvey B. Collins, (affectionately called by his friends "Rip" Collins) against the Government of the Virgin Islands, George Wade, Sr., Aubrey Todman, Luther Benjamin, Clifford Benjamin and "John Doe".

The Government of the Virgin Islands was named as a defendant by authority contained in Bill No.

1719 of the Fifth Legislature of the Virgin Islands of the United States where it waived the immunity of the Government of the Virgin Islands to suit.

The plaintiff, on October 27, 1964, moved to dismiss the action as against all defendants except the Government of the Virgin Islands. The motion has been granted and George Wade, Sr., Aubrey Todman, Luther Benjamin and Clifford Benjamin, have been dropped from the case.

The plaintiff was represented by Maas and Ireland (Thomas D. Ireland, Esq., of counsel) of Charlotte Amalie, Virgin Islands and Belli, Ashe & Gerry (Melvin M. Belli, Esq., of counsel) of San Francisco, California.

The defendant, Government of the Virgin Islands, was represented by the Attorney General of the Virgin Islands, Francisco Corniero, Esq.

The trial of this case before the Court without a jury commenced on October 27, 1964. The Court heard the testimony of witnesses and arguments of counsel and on October 30th, 1964, took the matter under advisement. The Court has reviewed the testimony of all the witnesses, the exhibits, has done extensive legal research in the matter and makes the following:

Findings of Fact

I

Harvey B. Collins is a citizen of the United States, and on February 3rd and 4th, 1961, was a member of

the United States Navy Underwater Demolition Team 21 temporarily stationed in St. Thomas, Virgin Islands of the United States.

II

On February 4th, 1961, plaintiff Harvey B. Collins was 30 years of age, and in excellent health. His life expectancy would be forty additional years.

III

The Virgin Islands of the United States are an unincorporated territory of the United States of America created by the Organic Act of 1936 (Act of Congress, June 22, 1936, Ch 669, 49 Stat. 1807) and the Revised Organic Act of 1954 (Act of Congress, July 22, 1954, Ch 558, 68 Stat. 497).

IV

At all times stated herein the Harwood Highway was and still is a public street, thoroughfare and highway on the Island of St. Thomas, Virgin Islands of the United States. The said highway was and is the property of, and under the control of, the Government of the Virgin Islands of the United States.

On January 22, 1963, the Fifth Legislature of the Virgin Islands of the United States passed Bill No. 1719 wherein it waived the immunity of the Government of the Virgin Islands to suit, and granted plaintiff the right to proceed against the Government as in the case of any other defendant in connection with personal injuries sustained by plaintiff arising out of

an automobile accident of February 4, 1961, which is the subject of the complaint herein. The said Bill was signed by the Governor of the Virgin Islands and became effective on January 25, 1963.

VI

It is the duty and responsibility of the Government of the Virgin Islands through its departments and agencies to administer for the protection of persons and property within the jurisdiction of the Virgin Islands; to keep the public highways in good serviceable condition and to repair and maintain same; and to administer, supervise, and enforce the regulations and laws covering the operation and control of motor vehicles and use of the streets and highways, and direct and control traffic and supervise and enforce the laws relating thereto; and to protect persons and property, including users of public highways, and to enforce obedience to the laws, and to rules and regulations issued in pursuance of law, throughout the Virgin Islands. The Government of the Virgin Islands has admitted to these duties and responsibilities.

VII

On February 3, 1961, George Wade Sr., while operating the truck of Luther Benjamin and while the said truck was traveling in a westerly direction and at approximately two o'clock P.M. on February 3, 1961, did, as a result of two (2) flat tires on the right rear of the vehicle, stop, park and abandon the said truck in the traveled portion of Harwood High-

way, and in an area where parking is prohibited by law, to wit: on the South side of Harwood Highway to the East of the submarine base road intersection and at a point approximately South of that building known as Arthur's Bamboushay Club. The truck was a Chevrolet truck modified to a dump truck, which was loaded with several tons of wet sand. The two right rear wheels were removed and its right rear axle rested upon concrete blocks. The said truck was parked and abandoned at a spot in a main highway on the island of St. Thomas, at a point where the highway is twenty-four (24) feet wide. The truck completely blocked the left lane of the highway, which is the lane traveled by users of the highway in the Virgin Islands.

VIII

The plaintiff was driving westerly on Harwood Highway in a Volkswagen "Microbus" at about 2:45 A.M. on Saturday, February 4, 1961, at which time the plaintiff struck the rear end of the truck.

IX

From the time the truck was parked and abandoned, at approximately 2:00 P.M. on February 3, 1961, until sometime after the accident occurred at 2:45 A.M. on February 4, 1961, the truck bore no reflectors, no tail lights nor any warning devices of any kind. There were no flares, barriers, or lights of any description to mark its presence on the highway.

X

The defendant Government of the Virgin Islands, through its agent police officers of its Department of Public Safety, had actual knowledge that the said truck was abandoned on the Harwood Highway without any warning devices to note its presence, and were aware that it constituted a danger, hazard, and nuisance for a period of at least two hours and forty-five minutes before plaintiff struck it.

At about midnight February 3-4, a citizen telephoned the police department and reported the truck's presence on the highway without lights, reflectors or other warning devices and advised the police department that he had almost collided with the truck and suggested that warning devices be placed around the truck to avoid an accident. At approximately 12:30 A.M., February 4th, a police cruiser containing two police officers, on routine patrol noted the presence of the truck, stopped and looked at it. They considered it a sufficient hazard, nuisance, and danger to attempt to locate flares to place around the truck, but did not do so because the flares were "not available" or "locked-up". The police continued on their routine inspection trip to the west of the location of the truck returning approximately one and a half hours later when they again noted the truck as a danger, hazard and nuisance. They then returned to police headquarters and had noted in the police logbook:

"2:00 A. M. Patrolman Colon and Niles present from making an inspection of Bourne Field, Sub-

Base, French Town and reported all quiet and that there is a dump truck park (sic) on the Harwood Highway."

The police officers took no steps whatsoever to warn users of the highway of this abandoned unlighted truck which they, the police officers, recognized as a distinct danger, hazard, and nuisance. The police officers had ample time, capacity and ability, before the accident, to mark the truck in such a manner as to warn users of the highway of its presence

After the accident, the same police officers placed a flashlight on the rear of the truck to mark its presence.

XI

A number of citizens narrowly missed crashing into the truck during the evening and night hours of February 3-4, 1961. Two drivers would probably have struck the truck had not last minute warnings been shouted by another person in the car, seated to the right of the driver, permitting the driver to swerve into the other lane.

XII

The abandoned truck was situated on a straightaway just after a curve to the left. The absence of lights or reflectors on the truck, its color, the background and overhead foliage, the position of street lights, and the truck's location combined to create a hazard, danger and nuisance to users of the highway.

XIII

The plaintiff, Harvey B. Collins, is and was a total abstainer from alcoholic beverages, a non-drinker, and was sober at the time of the accident.

XIV

At approximately 2:45 A.M. on February 4, 1961, the plaintiff, while driving alone in a westerly direction, struck the abandoned unlighted truck from the rear. The physical evidence together with the testimony of the plaintiff's expert in this case, show that the plaintiff swerved his vehicle to the right at the last moment in an apparent effort to avoid the truck. The left front cab of plaintiff's vehicle was stuck in under the bed of the truck. The plaintiff was pinned in his vehicle. Citizens arrived upon the scene within minutes. One of the first to arrive on the scene was a physician. The plaintiff was semi-conscious and in pain. Rescuers used pieces of wood, iron bars and a cutting torch to extricate the plaintiff from his vehicle. Considerable damage was caused to the plaintiff's vehicle from these rescue operations. The abandoned truck was virtually undamaged.

XV

As a direct result of the accident and the negligence of the defendant, the plaintiff has suffered the following:

a. Permanent brain damage from a compound depressed skull fracture in the left frontotemporal area with motor aphasia and hemiparesis.

Three operations have been performed. The first on February 4, 1961 and the second on February 5, 1961, were life saving operations during which fragments of bone and blood clots were removed from the plaintiff's brain substance. Portions of the brain substance were also removed. Damage to the plaintiff's brain substance has affected those areas controlling reasoning, speech, reading, writing, the emotions and personality.

b. The plaintiff suffered a right side paralysis and now is a partial paraplegic on his entire right side including involvement of his sexual organ and inability to use his right hand.

c. The plaintiff is an epileptic, with grand mal seizure, and must remain upon Delantin and Phenobarbital as anticonvulsant medication. He has had at least three grand mal seizures since the accident. There is no cure for plaintiff's epilepsy.

d. Further brain surgery may be necessary to prevent further grand mal seizures.

e. The plaintiff is unable to read or write as a result of the permanent brain damage.

f. The plaintiff is subject to bizarre personality changes; he suffers from temper tantrums and abnormal emotional outburst.

g. The plaintiff cannot drive an automobile.

h. The plaintiff is the sole supporter of his wife and two minor children.

i. The plaintiff is totally and permanently injured and is unemployable with the possible exception that he may be able to do custodial work providing he is able to control his temper and emotional disturbances.

j. The plaintiff has reached the maximum of physical and mental improvement possible. No further recovery can be expected.

k. The plaintiff will need permanent future medical care.

XVI

At the time of the accident the plaintiff had an earning capacity of at least four hundred and seven dollars ($407.00) per month and an assured job that would have brought him a salary up to seventy-eight hundred dollars ($7800.00) within five (5) years.

XVII

The reasonable value of the plaintiff's past medical expenses is ten thousand dollars ($10,000.00).

XVIII

The reasonable estimated value of the plaintiff's future medical expense is ten thousand dollars ($10,000.00).

XIX

There is no evidence that the plaintiff was driving other than with due care. The plaintiff suffers from retrograde amnesia and has no recollection of the accident or anything prior thereto for a period up to fifteen minutes prior to the accident. There is no evidence to rebut the presumption that plaintiff was driving with other than due care. There is no evidence that the plaintiff was guilty of contributory negligence.

XX

The negligence of the Government of the Virgin Islands was the proximate cause of the accident and of plaintiff's injuries.

The Court concludes from the foregoing Findings of Fact the following:

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and this cause of action.

2. The defendant Government of the Virgin Islands was negligent in that its agent employees did, after due notice, both actual and constructive, of the existence of a hazard, nuisance and breach of the laws on the Harwood Highway, wilfully fail to keep the said highway in a reasonably safe condition and did wilfully fail to administer, supervise and enforce the regulations and laws covering the operation of motor vehicles and use of the streets and highways and did fail to protect the users of said highway; and did after due notice both actual and constructive, of the existence of the said hazard, nuisance and resulting breach of the laws wilfully fail to mark the said truck's presence with appropriate lights or flares and did wilfully fail to warn the users of the highway of its location; and did wilfully allow the said dangerous condition and nuisance to remain for many hours and negligently and wilfully failed and neglected to take any precaution whatsoever to remove, abate, diminish, offset or counteract this dangerous condition and nuisance.

3. The abandoned truck constituted a *public nuisance* and an *absolute nuisance* unlawful under the Virgin Islands Code. (Prosser, LAW OF TORTS § 70 (1955); 14 V. I. C. 1462; 20 V. I. C. 463d, 497d, 20 V. I. R. & R. 491-106; 23 V. I. C. 96.)

4. The officials of the Government of the Virgin Islands violated the law and were negligent by maintaining the public nuisance and by wilfully omitting to perform their legal duty to remove the public nuisance or take steps to abate or offset it as a public nuisance. (3 V. I. C. 252, 257, 23 V. I. C. 1, 2, 6; 20 V. I. C. 491; 23 V. I. C. 94, 96, 125; 14 V. I. C. 1461, 1462; *Taylor v. City of Cincinnati,* 143 Ohio St. 426, 55 NE2d 724, 728.)

5. The misconduct of defendant in omitting to perform its duties was wanton and wilful.

6. Defendant's acts and omissions were the proximate cause of plaintiff's injuries.

7. The plaintiff was not guilty of contributory negligence. (Restatement of Torts, Sec. 477. The burden of establishing the plaintiff's contributory negligence rests upon the defendant.)

8. The plaintiff can recover a verdict in excess of his *ad damnum* clause. Rule 54 (c) *Federal Rules of Civil Procedure; Federal Practice and Procedure,* Barron & Holtzoff, Vol 3, § 1194; *Couto v. United Fruit Co.,* C. A. 2d, 1953, 203 F. 2d 456; *Audi Vision Inc. v. RCA Mfg. Co.,* C. C. A. 2d, 1943, 136 F. 2d 621, 147 A. L. R. 574.)

9. Plaintiff is entitled to recover for damages: (See *Leming v. Oilfield Trucking Company*, 282 P. 2d 23)

a. Medical services incurred	$ 10,000.00
b. Loss of past earnings	22,000.00
c. Future medical expense	10,000.00
d. Loss of future earnings	238,000.00
e. Pain and suffering, including pain and suffering and physical discomfort from injuries and resulting operations and treatment, and continuing pain and suffering from injuries and partial right side paralysis, past and future, embarrassment, humiliation and ridicule, including loss of enjoyment of life, and including loss of compatability with his wife and loss of sexual enjoyment, past and future	270,000.00

Plaintiff shall recover from defendant the total sum of $550,000.00

Dated: December 21, 1964

/s/ Walter A. Gordon
Judge

Appendix C

United States Court of Appeals
for the Third Circuit

No. 15,250

Harvey B. Collins,
Appellee,

vs.

Government of the Virgin Islands of the United States, George Wade, Sr., Aubrey Todman, Luther Benjamin, Clifford Benjamin and "John Doe", a person, firm, association or incorporation, and being a fictitious name, jointly, severally and in the alternative

Government of the Virgin Islands,
Appellant.

(D. C. Civil No. 27 - 1963)

Appeal from the District Court of the Virgin Islands,
Division of St. Thomas and St. John

Present: Kalodner and Hastie, Circuit Judges, and
Wright, District Judge.

JUDGMENT

This cause came on to be heard on the record from the District Court of the Virgin Islands, Division of St. Thomas and St. John, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the District Court, filed December 22, 1964, be, and it is hereby reversed, with costs, and the cause remanded for a new trial with directions to proceed in accordance with the opinion of this Court.

September 14, 1966

Attest:
Ida O. Creskoff,
Clerk.

Appendix D

United States Court of Appeals
for the Third Circuit

No. 15,250

Harvey B. Collins,
Appellee,

vs.

Government of the Virgin Islands of the United States, George Wade, Sr., Aubrey Todman, Luther Benjamin, Clifford Benjamin and "John Doe", a person, firm, association or incorporation, and being a fictitious name, jointly, severally and in the alternative

Government of the Virgin Islands,
Appellant.

Present: Staley, Chief Judge, McLaughlin, Kalodner, Hastie, Smith, Freedman, Seitz, Circuit Judges and Wright, District Judge.

The petition for rehearing filed by Appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who

concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

(Signed) Kalodner,
Circuit Judge.
Ida O. Creskoff,
Clerk.

Dated: October 10, 1966.

Appendix E

In the District Court of the Virgin Islands
Division of St. Thomas and St. John

Civil No. 27-1963

Harvey B. Collins,
Appellee,

vs.

Government of the Virgin Islands of the United States, George Wade, Sr., Aubrey Todman, Luther Benjamin, Clifford Benjamin and "John Doe", a person, firm, association or incorporation, and being a fictitious name, jointly, severally and in the alternative

Government of the Virgin Islands,
Appellant.

JUDGMENT

The trial of this case before the Court without a jury came on for hearing on October 27, 28, 29 and 30, 1964. The testimony of witnesses was taken and arguments of counsel were made. The Court took the matter under advisement and on December 21, 1964 entered its Findings of Facts and Conclusions of Law.

It is the Judgment of the Court that the plaintiff, Harvey B. Collins, shall recover against the defendant, Government of the Virgin Islands, the sum of Five Hundred and Fifty Thousand Dollars ($550,000.00) and costs of the prosecution of this cause of action.

December 22, 1964

/s/ WALTER A. GORDON
Judge